2004

The State of Utah v. Jonathan Hawke : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

THE STATE OF UTAH,	*	
	*	
Plaintiff/Appellee,	*	
	*	
v.	*	
	*	20040803-CA
JONATHAN HAWKE,	*	Case No. ~~20030676-CA~~
	*	
Defendant/Appellant.	*	

BRIEF OF APPELLANT

This is an appeal from a conviction for two counts of sexual exploitation of a minor, second degree felonies, in violation of Utah Code. Ann. §76-5a-3 (1953, as amended), in the Third Judicial District Court, State of Utah, the Honorable Randall N. Skanchy, Judge, presiding.

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IN THE UTAH COURT OF APPEALS

THE STATE OF UTAH, Plaintiff/Appellee, v. JONATHAN HAWKE, Defendant/Appellant.	* * * * * * * * *	Case No. 20030676-CA

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

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THE STATE OF UTAH,	*	
	*	
Plaintiff/Appellee,	*	
	*	
v.	*	
	*	
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NATURE OF THE PROCEEDINGS AND JURISDICTION

This is an appeal from a conviction for two counts of sexual exploitation of a minor, second degree felonies, in violation of Utah Code. Ann. §76-5a-3 (1953, as amended), in the Third Judicial District Court, State of Utah, the Honorable Randall N. Skanchy, Judge, presiding.[1]

The Utah Court of Appeals has jurisdiction over this matter pursuant to Utah Code Ann. §78-2a-3(2)(e) which states that this court has jurisdiction over "appeals from a court of record in criminal cases, except those involving a conviction or charge of a first degree felony or capital felony."

STATEMENT OF THE ISSUES, STANDARD OF REVIEW, AND PRESERVATION OF THE ARGUMENT

Issue 1: The first issue presented for review is as follows: The trial judge was biased and failed to recuse himself. Did the trial court judge improperly fail to *sua sponte*

[1] A Copy of the "Minutes Evidentiary Hearing Order" is attached as Addendum A.

recuse himself, fail to enter findings of fact concerning certain disputed letters and, subsequently, improperly proceed with the sentencing and the hearing on the motion to withdraw guilty plea in light of those letters attributed to Defendant that asked for strippers in jail and threatened harm and loss of life to the judge?

Standard of Review: The issue of judicial bias and failure of the judge to recuse himself is a question of law, reviewed for correctness.[2]

Preservation: This issue developed for the first time at the sentencing hearing of April 7, 2003 (R.89). Defendant's counsel did not object at the time and the trial judge did not *sua sponte* recuse himself. Defendant subsequently filed a timely notice of appeal following the signed order denying the motion to set aside guilty plea.

Statement of grounds for issue not preserved at lower court: Defendant claims plain error on the issue of judicial bias in the event this court rules that he did not properly preserve the issue in the lower court.

Issue 2: The second issue presented for review is as follows: Did the Defendant have ineffective assistance of counsel when his attorney failed to file a Rule 29 motion[3] to ask for recusal of the judge, given that inappropriate letters to the judge surfaced and were attributed to Defendant?

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[2] *State v. Alonzo,* 973 P.2d. 975, 975 (Utah 1998)

[3] Rule 29 of the Utah Rules of Criminal Procedure

Standard of Review: This court reviews an ineffective assistance of counsel claim raised for the first time on appeal without a prior evidentiary hearing as a question of law. The review is highly deferential.[4]

Preservation: This issue developed for the first time at the sentencing hearing of April 7, 2003 (R.89). Defendant subsequently wrote a letter to the judge in which he objected to his attorney and asked to withdraw his plea. (R.34-35) He then filed a timely notice of appeal following the signed order denying the motion to set aside guilty plea.

Statement of grounds for issue not preserved at lower court: Defendant claims plain error on the issue of ineffective assistance of counsel in the event this court rules that he did not properly preserve the issue in the lower court.

RELEVANT CONSTITUTIONAL PROVISIONS

The Fifth Amendment to the United States Constitution is relevant on appeal. This Amendment provides, in pertinent part:

> No person shall be . . . deprived of life, liberty, or property, without due process of law . . .

U.S. Const. amend. V.

The Sixth Amendment to the United States Constitution is relevant on appeal. This amendment provides, in pertinent part:

> . . . In all criminal prosecutions, the accused shall enjoy the right to . . . have the assistance of counsel for his defense.

U.S. Const. amend. VI.

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[4] *State v. Bryant,* 965 P.2d. 539 (Utah 1998)

STATEMENT OF THE CASE

On January 16, 2003, Mr. Hawke was charged by information with six counts of Sexual Exploitation of a Minor, each count a second degree felony. (R.1-3) An initial appearance was held on January 27, 2003. It was determined that Mr. Hawke was indigent and Scott A. Broadhead was appointed as public defender. (R.7-8) On February 24, 2003, Mr. Hawke entered a plea of guilty to counts I and II, each count a second degree felony of Sexual Exploitation of a Minor. (R.20-28) Sentencing was originally scheduled for April 7, 2003. (R.18-19) On April 7, 2004, the court made a motion for continuation of sentencing to allow counsel to review letters received by the court. (R.30-31) Mr. Hawke was sentenced on April 14, 2003 to a concurrent sentence of 1-15 years at the Utah State Prison. (R.32-33)

In a letter dated April 24, 2003 and filed with the court on May 6, 2003, Mr. Hawke submitted a handwritten letter asking to withdraw his plea. (R.34-35) At a motion hearing on June 9, 2003, Mr. Broadhead was allowed to withdraw, Mr. Parker was appointed as counsel for Mr. Hawke and an evidentiary hearing was scheduled. (R.44-45) The court denied Mr. Hawke's motion to withdraw guilty plea on July 28, 2003. (R.56) Mr. Hawke filed a pro se Notice of Appeal on August 20, 2003. (R.57-58)

On September 18, 2003, the Court of Appeals temporarily remanded this matter to the trial court to determine if Mr. Hawke was eligible for appointed counsel on appeal and, if so, to appoint counsel. (R.63) On November 3, 2003, the trial court determined that Mr. Hawke was indigent, but stated that there was no counsel available for appeal. (R.73-75) On December 30, 2003, the Court of Appeals filed an opinion directing Tooele County to

appoint a non-contracting attorney to represent Mr. Hawke. (R.76-78) On January 26, 2004, Mr. Angerhofer was appointed as conflict counsel to represent Mr. Hawke. (R.80-81) On July 1, 2004 the Appellate Court dismissed appeal no. 20030676-CA without prejudice because the trial court had not entered a written order denying the motion to withdraw guilty plea. (R. 96-97) On August 24, 2004, the trial court judge entered a signed order denying Defendant/Appellant's motion to withdraw guilty plea. (R. 105-107) On September 14, 2004, a notice of appeal was filed. (R. 113-114) Appellate case no. 20040803-CA was assigned to this matter.

STATEMENT OF THE FACTS

Mr. Hawke engaged in a plea colloquy with judge Randall Skanchy on February 24, 2003. (R.88 [2-9]) The judge explained the potential sentences to Mr. Hawke, the possible fines and surcharges, the waiver of certain constitutional rights, including the right to speedy trial by an impartial jury, the right to call witnesses and compel their attendance, the right to remain silent, the right to make the State prove its case beyond a reasonable doubt and explained the elements of the crimes. Id. At 5,6. The judge asked and received an affirmative response that Mr. Hawke was doing this of his own free will. Id. At 7. The judge determined that no promises were made to defendant, advised Defendant that the judge was not bound by recommendations made by counsel as to sentencing, verified that Mr. Hawke understood this, received Mr. Hawke's guilty pleas to the charges, required the State to provide a factual basis for the plea and confirmed with Mr. Hawke that the child pornography images were on his computer. Id. At 7-9.

Sentencing for Mr. Hawke was scheduled for April 7, 2003. The judge started the proceedings by attributing certain letters to Mr. Hawke: "Now, Mr. Broadhead, before we bring him out, have you seen the additional correspondence he's been so—so cooperative to provide to the Court today, so that his sentencing might be appropriately -- -- considered in light of all of the circumstances." (R.89[2]) The letters included one that was a proclamation of the new Ten Commandments asking in part for better accommodations at jail including better food, cigars, magazines and strippers to be provided on Friday and Saturday nights. Id. at 3, 5 (hereinafter, "The New Ten Commandments" letter) and a second letter suggesting that Mr. Hawke would have someone kill the judge Id. at 4. (Hereinafter "Threat" letter) After Mr. Hawke denied authorship of these letters, the Judge stated: "I don't know if that's also yours or not but I—you obviously ought to review that, because it will impact your sentence, believe me." Id. At 5. Sentencing was then continued to allow Mr. Hawke an opportunity to explain those letters. Id. At 5-6.

Sentencing was continued to April 14, 2003. (R.90) Mr. Broadhead, on behalf of Mr. Hawke, stated that the handwriting was different and that Mr. Hawke's first name was incorrectly spelled on the letter. Id. At 3-5. Meanwhile, another letter had been intercepted by the jail and proffered to the court by the prosecutor. Id. At 8. This latest letter, addressed to a sister of Mr. Hawke, makes the statement that Mr. Hawke's wife has promised to allow Mr. Hawke to see the children even if the state disallows it. Id. At 8-9. Immediately after Mr. Hawke addressed the court concerning this latest letter and acknowledged authorship of this letter to his sister, the court stated that "I don't think

the—letter has any bearing for me today in terms—of my deliberation associated with the appropriate sentence. So, don't let that be of some concern to you." Id. at 12. However, no findings were made by the court at this hearing concerning authorship of any of the previous letters. The court stated that the diagnostic unit makes determinations as to whether or not probation is appropriate, but that the court would not be inclined "in any stretch of the imagination" to consider probation in this case. Id. at 12-13. The court then listed the aggravating circumstances of multiple victims, position of special trust, multiple offenses and excuses as opposed to acknowledgement of what took place. Id. at 13.

SUMMARY OF THE ARGUMENTS

This appeal focuses on Mr. Hawke's right to due process at the time of sentencing. Mr. Hawke had the right to be sentenced by a fair and impartial judge following his entry of a guilty plea in this case. Mr. Hawke was seeking the opportunity to go to the diagnostic unit to be evaluated as a possible candidate for probation. Mr. Hawke had secured a promise from the State not to oppose a recommendation for a diagnostic evaluation prior to sentencing. (R.20-28[5]) It is true that the trial court judge is not bound by any recommendations made by defense counsel or by the prosecutor. Consequently, it is crucial that the judge not be influenced by any outside distractions such as threats to kill the judge or demands by a jail inmate for cigars and strippers while awaiting sentencing in the county jail if such distractions are not caused by the person to be sentenced.

In this case, the trial court judge **immediately** attributed the letters to Mr. Hawke when the judge asked at the beginning of the sentencing whether Mr. Hawke's attorney had "seen the additional correspondence he's been so—so cooperative to provide to the Court today . . ." (R.89[2]) Further indications of an impact on the judge's ability to be fair and impartial are evident when the judge told Mr. Hawke to review the letters and warned that "you obviously ought to review that, because it will impact your sentence, believe me." Id. at 5 (Emphasis added) Note that he did not say it would impact Mr. Hawke's sentence if Mr. Hawke were to be found to be the author. Rather, he said simply that it would impact his sentence, implying that the judge had already made up his mind as to the authorship of the letters.

At the rescheduled sentencing hearing, the trial court judge received argument from Mr. Hawke's attorney stating that the letters were not Mr. Hawke's, but the judge made no findings concerning those letters. The only reference that the judge made as to any letters occurred immediately after Mr. Hawke explained why he wrote a letter to Mr. Hawke's sister. The judge then said that "the letter" did not have any bearing on his sentencing. (R.90[12]). Given that the word "letter" was used in the singular and noting the immediate proximity of the judge's remark to Mr. Hawke's explanation of the letter to his sister, the comment by the judge can only refer to this latter letter and not to the other letters referring to "The New Ten Commandments" and to the threat on the judge's life. At most, the reference is ambiguous.

The judge should either have recused himself or made findings of fact concerning authorship of the previous letters and the credibility of defendant regarding his denial of

authorship. Failure to do so has denied Mr. Hawke his due process right to have a fair and impartial sentencing. The judge exhibited bias and, consequently, imposed a clearly excessive sentence upon defendant by not considering probation as even a possibility.

Defendant's counsel was ineffective when he failed to move the judge to recuse himself once he saw or should have seen that a conflict had arisen between the judge and the defendant.

ARGUMENT

A. The impartiality of the trial judge can reasonably be questioned and he should have recused himself under the Utah Rules of Judicial Conduct.

The Utah Supreme Court in *State v. Alonzo*, 973 P.2d 975, 979 (1998) referred to *State v. Neeley*[5], stating that "a judge should recuse himself when his 'impartiality' might reasonably be questioned." The statement of the judge, prior to hearing any explanation from defendant, that "The New Ten Commandments" letter and the "Threat" letter would impact defendant's sentence create the appearance of bias in this matter. No Rule 29 motion to recuse the judge was made by defendant's counsel. Therefore, analysis is limited to the judge's *sua sponte* obligation to ensure that due process requirements were met.

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[5] *State v. Neeley*, 748 P.2d 1091, 1094 (Utah), *cert. denied*, 487 U.S. 1220, 108 S.Ct. 2786, 101 L.Ed. 2d 911 (1988).

The court in *Alonzo* stated that the appearance of bias alone is insufficient to reverse the case. Actual prejudice must also be shown. *Id.* at 979, citing *State v. Gardner.*[6] In the present case, actual prejudice occurred when the trial court judge stated that the court would not be inclined "in any stretch of the imagination" to consider probation in this case (R.90[12-13]) Defendant was denied the opportunity to participate in a diagnostic program to evaluate his candidacy for probation.

B. Absent the judge recusing himself, he should minimally have made findings on the record concerning the letters.

The judge should have minimally made findings of fact concerning the authorship of the letters and the credibility of defendant's assertion that he did not write those letters. Findings of fact are required both for pre-trial motions and for motions to withdraw guilty pleas if good cause is shown as to the involuntariness of the plea. By extension, the same requirements for findings exist at a sentencing if a credibility issue or other issue requiring factual determination arises.

Rule 12(c) of the Utah Rules of Criminal procedure states in part that "Where factual issues are involved in determining a motion, the court shall state its findings on the record." The Utah Supreme court has ruled on this issue in *State v. Ramirez*, 817 P.2d 774 (Utah 1991). In *Ramirez,* the trial court record did not clearly support a ruling on a motion to suppress that a stop and seizure was legal. *Id.* at 788. The Utah Supreme Court consequently remanded Ramirez for a new trial. *Id.* at 789.

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[6] *State v. Gardner*, 789 P.2d 273, 278 (Utah 1979).

Findings of fact are required to be entered by a trial court prior to its entering of a denial of a defendant's motion to withdraw guilty plea if a defendant's evidence shows good cause that the plea was involuntary. *State v. Humphrey,* 79 P.3d 960 (Utah Ct. App. 2003). In *Humphrey*, a defendant testified about his state of mind during the plea colloquy and presented other evidence such as a letter from a social worker. However, the record did not clearly indicate whether the court made the necessary credibility assessment or factual determinations based on the evidence. *Id* at 962. The Court of Appeals cited *State v. Marshall*, 791 P.2d 880, 882 (Utah Ct. App. 1990) when it stated that findings must be "sufficiently detailed to allow the appellate court the opportunity to adequately review the trial court's decision. *Id* The Court then remanded *Humphrey* for the purpose of obtaining the necessary factual findings. *Id*

In the present case, although the credibility issue arises prior to the hearing on the motion to withdraw guilty plea and subsequent to the entry of plea, due process requires that the same credibility assessment and factual determinations be made at the time of sentencing as is required at the time of a pretrial motion or a motion to withdraw guilty plea since an issue arose that threatened the integrity of the sentencing process. "The New Ten Commandments" letter and the "Threat" letter, neither of which is contained in the file, but both of which are referred to in the transcripts, directly affect the relationship between the judge and the defendant. An ambiguous reference by the trial court judge to "letter" following defendant's explanation of a letter he admitted writing to his own sister, does not constitute a sufficiently detailed finding as required by *Humphrey.*

C. Defendant's counsel was ineffective when he failed to move the trial court judge to recuse himself.

Defendant's counsel was aware that the judge had received "The New Ten Commandments" letter and the "Threat" letter. (R.89[2]). Once the judge, referring to the letters, stated that "it will impact your sentence, believe me" *Id.* at 5, defendant's counsel should have filed a Rule 29 motion to recuse the judge. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052 (1984) sets forth a two-pronged test for ineffective assistance of counsel: counsel's performance must have been deficient and the deficient performance must have prejudiced the defense. *Id* at 687. The first prong was clearly met. Counsel had the duty to preserve the issue of judicial bias for review. Counsel was silent.

The second prong was also met. The failure of defendant's counsel to file the motion to recuse the judge prejudiced defendant. The strategy of seeking a diagnostic assessment for the possibility of probation was thwarted when the judge stated that the court would not be inclined "in any stretch of the imagination" to consider probation. *(R.*90 [12-13]).

D. Even if defendant failed to properly preserve the issue of judicial bias for review, plain error exists.

If Defendant failed to properly preserve the issue of judicial bias, then he must establish plain error. The Court of Appeals in *State v. Tueller,* 37 P.3d 1180, 1184 (Utah App. Ct. 2001) cited *Dunn* to set forth the requirements: "(i) an error exists; (ii) the error should have been obvious to the trial court; and (iii) the error is harmful, i.e., absent the

error, there is a reasonable likelihood of a more favorable outcome for the appellant."[7] In the present case, the error exists and should have been obvious to the trial court. The disputed letters were acknowledged by all parties. The judge thought them of sufficient import to continue the sentencing date. Once the sentencing recommenced, the issue of authorship of the disputed letters could not be ignored. Yet it was. Finally, the error was harmful. Defendant had had a legitimate chance at diagnostics and the possibility of probation. The prosecutor had promised not to oppose a recommendation for a diagnostic evaluation prior to sentencing (R.20-28[5]). All possibilities for probation evaporated once the letters surfaced and the judge denied defendant's request for diagnostics.

E. The only appropriate remedy is to vacate defendant's sentencing and remand the matter for resentencing before another trial court judge.

Just as in Ramirez 817 P.2d at 788-789, it is insufficient to merely remand this matter back to the same trial court judge. The Court was concerned in *Ramirez*, that to ask the trial judge to "address the admissibility question now would be to tempt it to reach a post hoc rationalization for the admission of this pivotal evidence. Such a mode of proceeding holds too much potential for abuse." *Id.* at 789. Similarly, to remand the present matter to the trial court and to ask the trial court judge to now make findings concerning the credibility of the defendant and the authorship of the letters given that the judge has previously stated for the record that "it will impact your sentence, believe me" and that the court would not "in any stretch of the imagination" consider probation would hold too

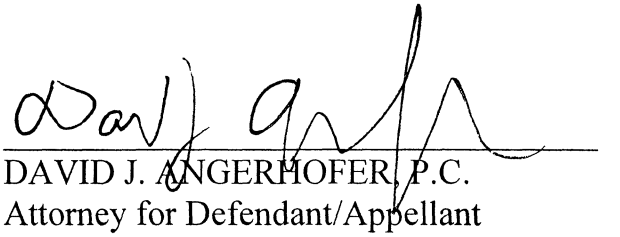
[7] *State v. Dunn*, 850 P.2d 1201, 1208-09 (Utah 1993)

much potential for a summary finding that the letters had no impact on sentencing in order to support the present sentence. Therefore, due process requires that defendant be remanded for sentencing before another trial court judge, with the fresh opportunity to seek admission to the diagnostic unit and the renewed possibility of probation.

CONCLUSION

Due process required that the trial court judge recuse himself because his continued impartiality was reasonably put into question at the time of sentencing. He should have, in the alternative to recusal, made findings of fact, even though no Rule 29 motion was filed because a need for a credibility assessment or a factual determination arose. Once "The New Ten Commandments" letter and the "Threat" letter surfaced in this case, the trial court judge had the duty to either recuse himself or make findings of fact concerning authorship of the letters and stating whether defendant's denial of authorship of those letters was credible. The judge's failure to take either course of action violated defendant's right to due process at the point of sentencing. Defendant's counsel was ineffective at sentencing when he failed to move the judge pursuant to Rule 29 of the Utah Rules of Criminal Procedure to recuse himself once the judge's statements were uttered. Defendant was prejudiced when the judge foreclosed the possibility of the diagnostic unit and eliminated the subsequent chance at probation. In spite of counsel's failure to make a Rule 29 motion, plain error exists in this matter. Due process requires remand to a different trial court judge for resentencing.

RESPECTFULLY SUBMITTED this 1 day of December, 2004



DAVID J. ANGERHOFER, P.C.
Attorney for Defendant/Appellant

CERTIFICATE OF DELIVERY

I, DAVID J. ANGERHOFER, hereby certify that I have caused to be hand-delivered the original and seven copies of the above to the Utah Court of Appeals, 450 South State Street, Salt Lake City, UT 84114-0230, and two copies to the Utah Attorney General's Office, Heber M. Wells Building, 160 East 300 South, Third Floor, P.O. Box 140854, Salt Lake City, UT 84114-0854, this 1 day of December. 2004

DAVID J. ANGERHOFER, P.C.

DELIVERED to the Utah Court of Appeals and the Utah Attorney General's Office as indicated above this 1 day of December, 2004.

ADDENDUM A

3RD DISTRICT COURT - TOOELE COURT
TOOELE COUNTY, STATE OF UTAH

STATE OF UTAH, Plaintiff,	:	MINUTES EVIDENTIARY HEARING ORDER
vs.	:	Case No: 031300030 FS
JONATHAN HAWKE, Defendant.	:	Judge: RANDALL N SKANCHY Date: August 24, 2004

Clerk: tawnil
DEFENDANT INFORMATION
Date of birth: August 9, 1961

CHARGES

1. SEX EXPLOITATION OF A MINOR - 2nd Degree Felony
   Plea: Guilty - Disposition: 02/24/2003 Guilty
2. SEX EXPLOITATION OF A MINOR - 2nd Degree Felony
   Plea: Guilty - Disposition: 02/24/2003 Guilty

HEARING

On July 28, 2003, the above-mentioned Court, Judge Randall N Skanchy presiding, held an evidentiary hearing pursuant to a pro se motion to withdraw guilty plea filed by defendant. A minute entry denying defendant's motion was issued on July 29, 2003. Defendant filed a pro se notice of appeal prior to the court signing a final order. The Utah Court of Appeals dismissed the appeal without prejudice because of the lack of a final order disposing of the motion to withdraw guilty plea. A notice of Remittitur was issued on August 5, 2004.

Wherefore, the Court, having heard argument on the motion to withdraw guilty plea, having reviewed the file in this matter and being otherwise fully advised in the premises, and for good cause appearing, the Court, now, therefore orders the following:

The Court denies the defendant's motion to withdraw his guilty plea, based upon the fact that, although Mr. Hawke argued that he had a defense to the charges he was unaware of at the time of his plea, that defense is premised upon double hearsay and is evidence that could not be

admitted in Court. Further, in view of the knowing and voluntary waiver made by Mr. Hawke, accompanied by his admission that he was guilty of the offense alleged,

the Court found it inconceivable that he could now argue that he did not do as alleged in the Information, i.e. he admitted that he committed the offense during the plea colloquy, but now asserts as his defense that he didn't do it.

This underscores that Mr. Hawke, if any of his argument is to be believed, knew of his innocence, and therefore that he had a defense, at the time he entered his plea.

Dated this 24 day of August, 2004.

RANDALL N SKANCHY
District Court Judge

CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 031300030 by the method and on the date specified.

METHOD	NAME
Mail	DAVID J ANGERHOFER ATTORNEY DEF 11075 S STATE STE 11 SANDY, UT 84070
By Hand	GARY K SEARLE

Dated this 24 day of Aug, 04.

Deputy Court Clerk